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Supreme Court, U.S.
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No._____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ROD BALKO, LAVERNE BALKO,
JUSTIN YARBROUGH, and
KELLY YARBROUGH
Petitioners,

vs.

STATE OF NEW MEXICO
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW MEXICO

ALLRED, LILLEY & MACIAS. P. A.
Attorneys at Law
By: Michael W. Lilley
125 S. Downtown Mall, Suite A
Las Cruces, New Mexico 88001
505-524-7809

ATTORNEY FOR PETITIONERS

28 pp

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER a criminal information charging a defendant with fraud which does not contain any allegation of ownership of the property allegedly obtained by fraud charged a crime, and whether a defendant is denied due process of law and the right to be informed of the nature and cause of the accusation by pleading guilty to the charge and sentenced thereon;

2. WHETHER a defendant is denied due process of law by pleading guilty to fraud, in violation of a general fraud statute, where the specific fraudulent conduct upon which the charge is based is prohibited by a more specific criminal statute.

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A

WHERE A CRIMINAL INFORMATION PURPORTS TO CHARGE FRAUD, BUT FAILS TO ALLEGE OWNERSHIP OF THE PROPERTY OBTAINED BY FRAUD, AND THE DEFENDANT PLEADS GUILTY TO THE CHARGE AND IS SENTENCED THEREON, THE DEFENDANT IS DENIED HIS RIGHTS TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AND TO DUE PROCESS OF LAW.

B

A DEFENDANT WHO IS CHARGED AND SENTENCED UNDER A GENERAL FELONY FRAUD STATUTE, WHERE THE FRAUDULENT CONDUCT ALLEGED CONSTITUTES A VIOLATION OF A SPECIAL MISMEANOR STATUTE,IS DENIED DUE PROCESS OF LAW.

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OPINIONS BELOW

The unpublished opinion of the Court of Appeals of the State of New Mexico, Cause No, 9203, filed May 22, 1986, is attached hereto at pages A-1/A-3 of the Appendix. The denial of Petition for Writ of Certiorari to the New Mexico Court of Appeals issued by the New Mexico Supreme Court on June 25, 1986, No. 16,444, is attached hereto at page A-4 of the Appendix.

JURISDICTION

The Court of Appeals of the State of New Mexico rendered its decision in this case on May 22, 1986. The Supreme Court of the State of New Mexico denied Petitioners' Petition for Writ of Certiorari to the New Mexico Court of Appeals on June 25, 1986. This Court has jurisdiction to review the decision in question by writ of certiorari under Title 28, United States Code, Section 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are:

a) Sixth Amendment to the United States Constitutuion, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have assistance of counsel for his defense.

b) Fourteenth Amendment to the United States Constitution, which provides, in pertinent part:

Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

c) Article II, Section 14 of the Constitution of the State of New Mexico. Due length of this Section, it has been set our verbatim below, as page A-5 of the Appendix.

d) Article II, Section 18 of the Constitution of the State of New Mexico, which provides:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under the law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973. (As amended November 7, 1972).

e) Section 30-16-6 (NMSA 1984 Repl. Pam.), which provides:

Fraud consists of the intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representation.

Whoever commits fraud when the value of the property misappropriated or taken is one hundred dollars ($100) or less is guilty of a petty misdemeanor.

Whoever commits fraud when the value of the property misappropriated or taken is over one hundred dollars ($100) but not more than twenty-five hundred dollars ($2,500) is guilty of a fourth degree felony.

Whoever commits fraud when the value of the property misappropriated or taken is a firearm is guilty of a fourth degree felony.

Whoever commits fraud when the value of the property misappropriated or taken exceeds twenty-five hundred dollar ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

Whoever commits fraud when the value of the property misappropriated or taken exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

f) Section 30-28-2 (NMSA 1984 Repl. Pam.), which provides:

A. Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state.

B. Whoever commits conspiracy shall be punished as follows:

(1) If the highest crime conspired to be committed is a capital or first degree felony, the person committing such conspiracy is guilty of a second degree felony:

(2) If the highest crime conspired to be committed is a second degree felony, the person committing such conspiracy is guilty of a third degree felony;

(3) If the highest crime conspired to be committed is a third degree felony or a fourth degree felony, the person committing such conspiracy is guilty of a fourth degree felony.

g) Section 30-42-3 (A) (6), (C), and (D) (NMSA 1980 Repl. Pam.), which provide:

As used in the Racketeering Act, [30-42-1 to 30-42-6 NMSA 1978]:

A. "racketeering" means any act which is chargeable or indictable under the laws of New Mexico and punishable by imprisonment for more than one year, involving any of the following cited offenses:

(6) Fraud, as provided in Section 30-16-6 NMSA 1978.

* * * * * *

C. "enterprise" means any sole proprietorship, partnership, corporation, business, labor union, association or other legal entity or any group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities; and

D. "pattern of racketeering activity" means engaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited activities set forth in subsections A through D of Section 30-42-4 NMSA 1978; provided that at least one of such incidents occurred after the effective date of the Racketeering Act. and the last of which occurred within five years after the commission of a prior incident of racketeering.

h) Section 30-42-4(C) (NMSA 1980 Repl. Pam.), which provides:

C. It is unlawful for any person to engage in a pattern of racketeering activity in order to acquire or maintain, directly, or indirectly any interest in or control of any enterprise. Whoever violates this subsection is guilty of a second degree felony.

i) Section 66-8-1 (NMSA 1978), which provides:

Any person who knowingly uses a false or fictitious name in any application for the registration of vehicle or a vertificate of title, or knowingly makes a false statement, or knowingly conceals a material fact or otherwise commits a fraud in any such application shall upon conviction be punished by a fine of not more that one thousand dollars ($1,000) or by imprisonment for not more than one year or both.

STATEMENT OF THE CASE

Petitioners Rod and Laverne Balko, husband and wife, were the owners of Las Cruces Auto Sales in Las Cruces, New Mexico. In April 1985, Laverne Balko and her daughter, Petitioner Kelly Yarbrough, became the targets of a criminal investigation concerning motor vehicle titles. A search warrant authorizing the search of Las Cruces Auto Sales was issued and executed in April 1985, and evi-

dence connecting Petitioners to the activities under investigation was seized. All Petitioners then became targets of the investigation. Later that month, all Petitioners met with members of the New Mexico Attorney General's staff and of the Las Cruces Police Department, and all agreed to cooperate fully in their investigation of activities similar to those for which Petitioners were under investigation. All gave statements concerning their own activities, and agreed to plead guilty to criminal charges, which were not specified at that time.

On May 1, 1985, all Petitioners appeared before District Judge James T. Martin of the Third Judicial District Court, State of New Mexico, and, pursuant to plea agreements executed by them in open court, pled guilty to the charges contained in a criminal information, which was filed later that day. The plea and disposition agreements and criminal information appear herein at pages A-6/A-10 of the Appendix. Petitioners were not, and had not been, represented by counsel. All waived their right to counsel in open court.

Count I of the information attempted to charge all Petitioners with fraud in excess of $100, contrary to Section 30-16-6 (NMSA 1984 Repl.Pam.). It alleged that on one or more occasions Petitioners misrepresented material facts to the Department of Motor Vehicles and the State of New Mexico, including misrepresentations as to the mileage on motor vehicles and the ownership of those vehicles; that the motor vehicle department relied on those misrepresentations in issuing false motor vehicle titles, and that the value of each title exceeded $100.

Count II of the information attemped to charge Petitioners Rod Balko and Justin Yarbrough with fraud in excess of $2,500, contrary to Section 30-16-6 (NMSA 1984 Repl.Pam.). It alleged that on one or more occasions these Petitioners rolled back the odometers on motor vehicles, sold the vehicles in that condition to purchasers, and that as a result of these misrepresentations and the purchasers' reliance on them, these Petitioners obtained or took in excess of $2,500 on one or more occasions.

Count III attempted to charge all Petitioners except Rod Balko with conspiracy to commit fraud in excess of $2,500, contrary to Section 30-28-2(B) (3) (NMSA 1980 Repl. Pam.), and simply incorporated the allegations of Count II.

Count IV attempted to charge petitioner Rod Balko with racketeering, contrary to Section 30-42-4 (C) (NMSA 1978), based on the acts alleged in Counts I and II to have been committed by him.

Petitioners then appeared before Third Judicial District Judge Garnett Burks, Jr., on September 9, 1985, for sentencing. A public defender had been appointed to advise, although not represent, Petitioners at sentencing. All Petitioners were sentenced to terms of imprisonment.

Petitioners then retained counsel and, after moving for reconsideration of sentences, which motion was denied, moved to set aside their guilty pleas. The allegations in that motion which are pertinent to the questions presented herein were that "In fact, the allegations contained in the criminal information were not sufficient to allege criminal activity by these Defendants. By pleading guilty to the allegations in the criminal information, Defendants did not plead guilty to any crime" (paragraph 11, Motion to Withdraw Guilty Pleas).

An evidentiary hearing was held on Petitioners' Motion to Withdraw Guilty Pleas on November 6, 1985. Counsel for Petitioners argued that Count I of the criminal information was fatally defective for having failed to allege ownership of the motor vehicle titles allegedly obtained by fraud; that Count II was likewise fatally defective for having failed to allege ownership of the money allegedly obtained by fraud; that Counts III and IV were fatally defective because they simply incorporated the allegations of Counts I and II; and that the acts alleged in Count I constituted a violation of Section 66-8-1 (NMSA 1980 Repl.), making it a misdemeanor to knowingly submit false information in an application for a motor vehicle title, instead of fraud. Even though the Assistant Attorney General representing the state at the hearing acknowledged that he had drafted the criminal information, and that Count I charged Petitioners with defrauding the State of New Mexico, the Court stated that Count I charged Petitioners with defrauding the ultimate purchasers of the vehicles for which Petitioners had obtained fraudulent titles. That is exactly the crime charged in Count II.

After the hearing, the Court entered its Findings of Fact and Conclusions of Law. These are attached hereto at pages A-11/A-12 of the Appendix. The Court concluded that all counts alleged the essential elements of the offenses charged and adequately advised the Petitioners of the crimes with which they were charged, and denied Petitioners' motion.

Petitioners appealed the denial of their Motion to Withdraw Guilty Pleas to the New Mexico Court of Appeals. In their Docketing Statement, Petitioners raised two issues: whether the allegations contained in the criminal information charged criminal offenses by these Defendants, and whether the trial court erred in denying the Motion to Withdraw Guilty Pleas. The New Mexico Court of Appeals proposed summary affirmance in its calendaring notice. Petitionerstrue, timely filed a Memorandum in Opposition to Summary Affirmance. Therein they raised the issues that are now being presented to this Court. Petitioners argued, "First, all four Defendants have been

denied their rights to due process of law and to be informed of the charges against them under the Fourteenth and Sixth Amendments to the United States Constitution. State v. Foster, 87 NM 155, 530 P2d 949 (Ct App 1974)." (Mem. Opp. Sum. Aff. p.3). They further stated:

"Third, the fraud alleged against all Defendants in Count I, if true, constitutes a violation of s. 66-8-1 (NMSA 1978) making it a misdemeanor to knowingly make a false statement in an application for a certificate of title. Had ownership of the titles allegedly obtained by fraud been properly alleged, and
hence a crime charged, the Defendants could then have raised this statute as a defense to the felony fraud charge and forced the state to charge them only with the misdemeanor violation CF State v. Blevins, 40 NM 367, 60 P2d 208 (1936) (where general statute and special statute condemned the same acts, and special statute carried a heavier sentence than the special statute, conviction based on general statute invalid.)" (Mem. Opp. Sum. Aff. p. 4-5).

The New Mexico Court of Appeals then issued its unpublished Memorandum Opinion affirming Petitioners' convictions. (Appendix A-1/A-3). It specifically rejected Petitioners' claims that an allegation of ownership of the property obtained by fraud is necessary to the sufficiency of a fraud charge and that the general and special statutes cited by Petitioners proscribed exactly the same conduct. Petitioners then petitioned the New Mexico Supreme Court to issue its Writ of Certiorari to review the decision of the Court of Appeals. They requested the Court to decide the following issue, "Whether the criminal informations filed against the Petitioners failed to allege offenses and, if so, whether that failure denied Petitioners their right to due process and thereby deprived the trial court of jurisdiction" (Pt. Writ of Cert. p.1). The petition was denied. (Appendix A-4).

ARGUMENT

A

WHERE A CRIMINAL INFORMATION PURPORTS TO CHARGE FRAUD, BUT FAILS TO ALLEGE OWNERSHIP OF THE PROPERTY OBTAINED BY FRAUD, AND THE DEFENDANT PLEADS GUILTY TO THE CHARGE AND IS SENTENCED THEREON, THE DEFENDANT IS DENIED HIS RIGHTS TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AND TO DUE PROCESS OF LAW.

Under New Mexico law, a defendant may be charged with a felony by either indictment or information. Rule 5, New Mexico Rules of Criminal Procedure for the District Courts. Both are written statements which must include the essential facts, common name of the offense and, if applicable, a specific section number of the New Mexico Statutes which defines the offense. Rule 5(c) and (d), New Mexico Rules of Criminal Procedure for the District Courts. Rule 5 codifies a defendant's right under the United States and New Mexico Constitutions to be informed of the nature and cause of the accusation lodged against him. Amendments VI and XIV, United States Constitution and Article II, Section 14, Constitution of the State of New Mexico. This Court has often recognized that an indictment or information passes constitutional muster "if it, first, contains the elements of the offense charge and fairly informs the defendant of the charge against him which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense", United States v. Bailey, 444 US 394, 414 (1980), Hamlin v. United States, 418 US 87, 117 (1974). Failure to meet these basic criteria renders an indictment or information fatally defective. Russell v. United States, 369 US 749 (1962).

Counts I and II of the information filed against Petitioners attempt to allege fraud, in violation of Section 30-16-6 (NMSA 1984 Repl. Pam.). That section defines fraud as the intentional misappropriation or taking of anything of value belonging to another by means of fraudulent practices, conduct or representations. That the property taken belongs to another is by definition an essential element of the crime of fraud. It must be alleged to make a fraud charge under Section 30-16-6 constitutionally sufficient. See United States v. Bailey, 444 US at 414. Failure to allege this essential element renders Counts I and II legally deficient and, because Counts III and IV necessarily depend on the sufficiency of Counts I and II, deprives the trial court of jurisdiction of all allegations contained in the in-

formation. See State v. Ferguson, 56 NM 398, 244 P2d 783 (1952) (failure to allege intent to deceive in indictment for obtaining money by false pretenses deprived the trial court of jurisdiction).

New Mexico long ago adopted the obvious and fundamental principle that ownership of the property obtained is an essential element of fraud that must be alleged in a charging document. In Territory v. Hubbell, 14 NM 579, 86 P 747 (1906), the New Mexico Territorial Supreme Court affirmed the sustaining of a demurrer to an indictment charging obtaining money by false pretenses because the indictment did not allege ownership of the property allegedly obtained by fraud. This position was reaffirmed by the Supreme Court of the State of New Mexico in State v. Faggard, 25 NM 76 177 P. 748 (1918), in which the Court again affirmed the sustaining of a demurrer to an indictment alleging obtaining money by false pretenses because the indictment failed to "directly and distinctly" allege ownership of the property involved. 25 NM at 81. This principle remains intact. New Mexico's Criminal Uniform Jury Instruction defining the elements of fraud includes the element that the property obtained belonged to another. NMUJI Crim. 16.30.

Counts I and II, which attempt to charge fraud in violation of Section 30-16-6, contain no "direct and distinct" allegations regarding ownership of the property obtained; they allege neither that some particular person or entity did own the property nor that Petitioners did not. Count I alleges that all Petitioners misrepresented material facts to the New Mexico Department of Motor Vehicles, including representations as to the ownership of the vehicles and representations in documents as to the mileage reflected in odometer readings; that New Mexico Department of Motor Vehicles and the State of New Mexico relied on these misrepresentations in issuing new motor vehicle titles to Petitioners; and that the value of the titles obtained exceeded $100. Count II alleges that Petitioners Rod Balko and Justin Yarbrough altered the true odometer readings on motor vehicles; that purchasers of the vehicles relied on the falsified odometer readings and fraudulent title documents obtained by Petitioners reflecting the false odometer readings; and that as a result of these misrepresentations and the purchasers' reliance on them, these two Petitioners obtained or took in excess of $2,500 on one or more occasions.

The necessity and wisdom of requiring that a fraud charge allege ownership of the property obtained is clearly illustrated by the deficiencies of this information, particularly Count I. A defendant charged with fraud is at least entitled to know who the State claims he has defrauded, from whom he has allegedly obtained property by his fraudulent conduct. Yet the District Judge who initially considered Petitioners' challenge to the Court's jurisdiction and the

Assistant Attorney General who drafted the information could not agree on who the Petitioners were accused of having defrauded under Count I. The former, based on his reading of Count I, felt that Petitioners were being accused of defrauding the ultimate purchasers of the vehicles for which false title documents had been obtained, which appears to be exactly the crime charged under Count II. The latter insisted that the defrauded parties were the New Mexico Department of Motor Vehicles and the State of New Mexico.

When a District Judge and an Assistant Attorney General cannot agree on what an information alleges as to ownership of property obtained by fraud, how can anyone reasonably say that the information contains the elements of the offense charged and fairly informs the Defendant of the charge against him? The New Mexico Court of Appeals failed to perceive this dilemma. It ruled that proof of ownership in a particular person is not an essential element of fraud under Section 30-16-6; all that must be alleged and proved is that ownership was in someone other than the Defendant. Appendix A-1/A-2. The Court made no effort to reconcile its holding with the holdings of the New Mexico Supreme Court in Territory v. Hubbell and State v. Faggard, supra, that ownership of the property obtained must be alleged in a fraud indictment. Nor did it identify any allegation in either Count I or Count II that the property obtained belonged to someone other that Petitioners. It sidestepped these basic questions altogether. Its ruling was clearly erroneous.

Petitioners' claim, particularly as to Count I, is not one of a mere technical defect. Rather, it goes to the heart of the concept of fraud. The State of New Mexico does not "own" the titles to motor vehicles; a certificate of title is simply a piece of paper, evidence of ownership of the vehicle to which it applies. The owner of the vehicle owns the title to it. Count I fails to allege ownership of the titles obtained in someone other than Petitioners for the simple reason that it cannot. Clear away the verbal underbrush in Count I and that fact becomes readily apparent. Counts I and II do not charge fraud in violation of Section 30-16-6. They do not contain the essential elements of such a charge. They are constitutionally deficient, Russell v. United States, supra, and conferred no jurisdiction on the trial court, State v. Ferguson, supra. This Court should therefore review the actions of the New Mexico appellate courts to correct their erroneous rulings.

B

A DEFENDANT WHO IS CHARGED AND SENTENCED UNDER A GENERAL FELONY FRAUD STATUTE, WHERE THE FRAUDULENT CONDUCT ALLEGED CONSTITUTES A VIOLATION OF A SPECIAL MISDEMEANOR STATUTE' IS DENIED DUE PROCESS OF LAW.

All Petitioners were charged in Count I of the criminal information with having obtained motor vehicle titles from the State of New Mexico and the New Mexico Department of Motor Vehicles through fraudulent misrepresentations. Petitioners have claimed herein that Count I is fatally defective for having failed to allege ownership of the titles. Petitioners' preceeding argument on that point is incorporated herein by reference.

Under New Mexico law, it is a misdemeanor, punishable by a fine of up to $1,000 and imprisonment for up to one year, for any person to knowingly make a false statement, knowingly conceal a material fact or otherwise commit a fraud in an application for a certificate of title to a motor vehicle. Section 66-8-1 (NMSA 1978). Count I charges that Petitioners made at least two misrepresentations to the New Mexico Department of Motor Vehicles and the State of New Mexico - that Petitioners owned the vehicles for which titles were obtained, when in fact they were owned by out-of-state dealers interested in obtaining frudulent New Mexico titles (Count I later alleges that Petitioners were acting for themselves or as agents of the out-of-state dealers), and that Petitioners misrepresented the true odometer readings on these vehicles. It then alleges that the titles were forwarded to the out-of-state dealers (by whom is not alleged) and were used by them or others to sell the vehicles in those states. This final allegation is superfluous. It does not allege that Petitioners did anything illegal; it alleges only that other persons in other states sold the vehicles for which titles had been obtained. It must therefore be disregarded.

Where both a general and a special statute proscribe the same illegal conduct, the State must charge the defendant under the special statute; it has no discretion in the matter. State v. Blevins, 40 NM 367, 60 P2d 208 (1936). In that case, the defendant was charged under a general statute making it a felony to knowingly sell property not belonging to him. The court held that the defendant should have been charged under a special statute making it a lesser degree of felony to knowingly sell livestock not belonging to him and reversed the conviction. In determining whether the acts alleged

violated both statutes, the Court applied the test announced by this court in Blockburger v. United States, 284 US 299 (1932), which is whether each provision requires proof of an additional fact which the other does not. If the answer to that question is "no", the general -versus-special rule must be applied.

The New Mexico Court of Appeals purported to apply this test in rejecting Petitioners' claim under this point. It stated that, "in order for a specific statute to apply to the exclustion of a general statute, both statutes must proscribe the same act" Appendix A-2. It then reasoned that Section 66-8-1 does not require that a defendant actually obtain a title; the crime is complete when a knowingly false application for title is submitted. Fraud under Section 30-16-6, on the other hand, requires the taking of something of value, in this case the titles. The court then stated, "defendants were not charged with merely making false applications for titles; they were charged with facilitating the interstate transfer of fraudulent titles by obtaining the titles through falsified applications to the New Mexico Department of Motor Vehicles", Appendix A-3. Therefore, according to the Court, the general versus special rule does not apply to this case.

The Court of Appeals has completely misinterpreted Count I. The essence of the Count is contained in its opening paragraph, which states that Petitioners "intentionally committed the crime of fraud . . . by misrepresenting material facts to the New Mexico Department of Motor Vehicles and the State of New Mexico." Appendix A-5. The remainder of Count I simply specifies, however inartfully, the alleged misrepresentations. The only misrepresentations alleged in Count I to have been made by Petitioners were contained in applications for certificates of title. Intentionally misrepresenting facts to the Department of Motor Vehicles in an application for a certificate of title is exactly what Section 66-8-1 condemns. That is also exactly what Count I alleges. Both the trial court and the New Mexico Court of Appeals erred in failing to apply the general-versus-special rule under these circumstances.

Furthermore, to the extent that the New Mexico Court of Appeals was drawing a distinction between intentionally misrepresenting facts in an application for a certificate of title and obtaining a title containing the misrepresentations, and holding that it is felony fraud to obtain the falsified title, the court was again in error. The distinction is irrational. First, this interpretation gives the State the power to convert a defendant's misdemeanor into a felony by simply sending him a certificate of title containing the false information. Second, one cannot separate the certificate of title from the vehicle to which it applies. The certificate of title belongs to the owner of the vehicle. The owner cannot commit felony fraud with the falsified

title unless and until he used that title to defraud a subsequent purchaser of the vehicle. This is what is charged in Count II. Merely obtaining the falsified title is not and cannot be felony fraud. The New Mexico Court of Appeals was correct in stating that Section 66-8-1 and Section 30-16-6 proscribe different acts. Under the Blockburger test, violations of each section would not merge. The Court erred, however, in deciding the Count I charged anything more than a violation of Section 66-8-1. It should have applied the general-versus special rule. Its faulure to do so deprived Petitioners of their right to due process of law. This Court should grant Petitioners' petition and correct these errors.

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CONCLUSION

For the reasons stated herein, Petitioners Rod Balko, Laverne Balko, Justin Yarbrough and Kelly Yarbrough respectfully request this court to grant their Petition for a Writ of Certiorari to the New Mexico Supreme Court, to reverse their convictions, and to remand their cases back to the trial court for further proceedings.

ALLRED, LILLEY & MACIAS. P. A.
Attorneys at Law
By: Michael W. Lilley
125 S. Downtown Mall, Suite A
Las Cruces, New Mexico 88001

ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed via first class mail to the New Mexico Attorney General, Criminal Division, Post Office Drawer 1508, Santa Fe, New Mexico 87503, on this day of August, 1986.

MICHAEL W. LILLEY

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
vs.
ROD BALKO, LAVERNE BALKO,
JUSTIN YARBROUGH, and
KELLY YARBROUGH
Defendant-Appellant.

No. 9203

APPEAL FROM THE DISTRICT COURT OF
DONA ANA COUNTY
GARNETT R. BURKS, JR., District Judge

PAUL BARDACKE, Attorney General
Santa Fe, New Mexico Attorney for Plaintiff-Appellee

LAWRENCE W. ALLRED
ALLRED, LILLEY & MACIAS
Las Cruces, New Mexico Attorneys for Defendants-Appellants

MEMORANDUM OPINION

DONNELLY, Judge

Each of the defendants were indicted on charges of fraud, conspiracy, and racketeering, stemming from an interstate scheme of automobile title transfers and odometer rollbacks. Defendants pled guilty to all charges against them and were sentenced to terms of imprisonment. Following sentencing, defendants moved to withdraw their guilty pleas, claiming the state had failed to keep its part of the plea bargain agreements. The trial court denied the motion and defendants appealed. Our calendaring notice proposed summary affirmance. Defendants have filed a timely memorandum in opposition. Finding the memorandum unpersuasive, we affirm.

JURISDICTION

Defendants allege a lack of jurisdiction because of insufficiencies in the grand jury indictment. They claim the indictment was fatally defective because it failed to specify ownership of the fraudulently obtained automobile titles. However, proof of ownership in a particular person is not an essential element of the crime of fraud, NMSA 1978, 30-16-6 (Repl.Pamp.1984). Cf. State v.

Shroyer, 49 N.M. 196, 160 P.2d 444 (1945). Proof of fraud charged under Section 30-16-6 does not require proof of ownership in a particular person, only proof that the property belonged to someone other than the defendant. NMSA 1978, UJI Crim. 16.30 (Repl.Pamp 1982). Because ownership was not a necessary allegation, deffendants' claim is not one of jurisdictional error but is instead a claim of insufficient notice under the circumstances. Id; NMSA 1978, Crim.P.R. 8(a) (Repl.Pamp.1985). In order to constitute reversible error, pleading inadequacies must be shown to have prejudiced an accused's defense or his substantial rights. NMSA 1978, Crim.P.R. 7 (Repl.Pamp.1985); State v. Vialpando, 93 N.M. 289, 599 P.2d 1086 (Ct.App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979). Here, any issue as to lack of notice was waived by defendants under the terms of their plea and disposition agreements, which provided for the waiver of "any and all motions, defenses, objections or requests which [they have] made or raised, or could assert hereafter, to the court's entry of judgment against [them] and imposition of a sentence upon [them] consistent with this agreement." See Baird v. State, 90 N.M. 667, 568 P.2d 193 (1977). Because the indictment was legally sufficient, and because defendants waived any lack of notice, this issue is without merit.

Defendants also claim jurisdictional error because they were charged and sentenced under the general fraud statute for the offense charged in Count I of the indictment. Defendants claim the more specific applicable statute is NMSA 1978, Section 66-8-1 of the New Mexico Motor Vehicle Act, which prohibits fraudulent applications of the procurement of automobile registrations and certificates of title. We disagree. In order for a specific statute to apply to the exclusion of a general statute, both statutes must proscribe the same act. State v. Muise, 103 N.M. 382, 707 P.2d 1192 (Ct. App. 1985); State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

The crime of fraud (Section 30-16-6) and the crime of fraudulently applying for automobile registration and titles (Section 66-8-1) require proof of different statutory elements. Section 66-8-1 does not require proof that the accused actually obtained a registration or certificate of title; the crime is complete when the accused uses "a false or ficticious name in any application . . . or knowingly makes a false statement, or knowingly conceals a material fact or otherwise commits a fraud in any such application . . . ." The crime of fraud, by contrast, requires proof of an actual misappropriation, or taking or an obtaining of anything of value; in this case, the certifi-

cates of title. Defendants were not charged with merely making false applications for titles; they were charged with facilitating the interstate transfer of fraudulent titles by obtaining the titles through falsified applications to the New Mexico Department of Motor Vehicles. Accordingly, there is no basis for application of the specific versus general statute rule. Id.

SUFFICIENCY OF THE EVIDENCE

Defendants concede that their guilty plea hearing was conducted in conformity with the requirements of NMSA 1978, Crim.P. Rule 21 (Repl.Pamp. 1985). See State v. Lucero, 97 N.M. 346, 639 P.2d 1200 (Ct.App.1981). However, they claim the trial court was not justified, by the evidence presented at their subsequent motion hearing, in finding that their pleas were made knowingly and voluntarily, rather than as the result of unlawful inducement. They emphasize that the state presented no witnesses to rebut their claim that members of the attorney general's staff instructed them to answer in the negative when asked by the court if their willingness to plead guilty was the result of any threats, promises, or inducements, other than the promises contained in their plea and disposition agreements. The state, however, was not required to present such evidence. The protective procedure contained in Crim.P. Rule 21 is designed to obtain full disclosure of plea agreements in the trial court and to limit the matters subject to appellate and collateral attack. State v. Lucero.

When a plea hearing has been conducted in conformity with Crim.P. Rule 21, a defendant is bound by what he discloses to the court during the hearing, State v. Miranda, 100 N.M. 690, 675 P.2d 422 (Ct.App.1983), and the state is entitled to rely on the written record of the hearing. Id. Here that record includes defendants' sworn affidavits attesting to their understanding of the plea and disposition agreements and their willingness to enter guilty pleas under the terms and conditions thereof. The trial court was similarly entitled to rely on the written record of the plea hearing. Id. Accordingly, the trial court's factual findings are supported by substantial evidence and will not be disturbed on appeal.

For the reasons and authorities cited herein, and the reasons and authorities cited in our calendaring notice, the trial court is affirmed.

IS SO ORDERED

THOMAS A. DONNELLY, Judge

WE CONCUR:
PAMELA B. MINZNER, Judge
HARVEY FRUMAN, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
WEDESDAY, JUNE 25, 1986

ROD BALKO, et al.,
Petitioner,
vs.
STATE OF NEW MEXICO
Respondent.

No. 16,444

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised;

NOW THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 9203 is hereby returned to the clerk of the Court of Appeals.

ATTEST: A TRUE COPY
SEAL

Rose Marie Alderete (signed)
Clerk of the Supreme Court
of the State of New Mexico

Article 2, Section 14, New Mexico Constitution

No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general or their deputies, except in cases arising in the militia when in actual service in time of war or public danger. No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having vaived such preliminary examination.

A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury. Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a majority of those who compose a grand jury, and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than seventy-five resident taxpayers of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him in a language that he understands; to have compulsory process to compel the attendance of necessary witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. (As amended November 4, 1924, effective January 1, 1925).

THIRD JUDICIAL DISTRICT COURT
COUNTY OF DONA ANA
STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff,

vs.

ROD BALKO, LAVERNE BALKO
JUSTIN YARBROUGH and
KELLY YARBROUGH, No. CR-85-96

Defendants. JUDGE BURKS

CRIMINAL INFORMATION

The Attorney General of the State of New Mexico charges:

COUNT 1

That between the first day of May, 1983 and the thirty first day of March, 1985, in Dona Ana County, State of New Mexico, the defendants Rod Balko, Laverne Balko, Justin Yarbrough and Kelly Yarbrough intentionally committed the crime of fraud in excess of $100 on one or more occasions, by misrepresenting material facts to the New Mexico Department of Motor Vehicles and to the State of New Mexico.

The material misrepresentations included but were not limited to statements that the motor vehicle for which title was being substituted, was owned by either Las Cruces Auto Sales or Frontier Leasing and Sales. In fact, the vehicles were owned by out-of-state dealers interested in obtaining a fraudulent New Mexico title to their vehicle.

Another misrepresentation concerned the mileage of the vehicle. Typically the actual mileage reflected on the original out-of-state title was altered. New or altered bills of sale and odometer statements containing the false odometer readings were presented to the New Mexico Motor Vehicle Department in Las Cruces. These and other false documents were relied upon by that Department and by the State of New Mexico in issuing the new title to the defendants,

acting for themselves or as agents for the out-of-state dealer/owners.

The New Mexico titles were then forwarded to the respective out-of-state dealers and used by them or others to sell the cars in those states. These and other misrepresentations were relied upon by the New Mexico Motor Vehicle Department and by the State of New Mexico.

The value of each of these fraudulent titles, obtained by the defendants either for themselves or on behalf of other dealers was in excess of $100.

Fraud in excess of $100 is a fourth degree felony, contrary to Section 30-16-6 NMSA 1978 Comp., as amended.

COUNT 2

That between the first day of May 1983, and the thirty first day of March, 1985, in Dona Ana County, State of New Mexico, the defendants Rod Balko and Justin Yarbrough intentionally committed the crime of fraud in excess of $2,500, on one or more occasions, by physically changing or causing to be altered the true mileage or odometer readings on motor vehicles which they in turn sold to purchasers at Las Cruces Auto Sales and Frontier Leasing and Sales.

These misrepresentations of the actual odometer readings together with fraudulent title documents purporting to verify that the altered odometer readings were accurate, were relied upon by purchasers on one or more occasions. As a result of these and other misrepresentations and the purchasers' reliance on them, the defendants obtained or took in excess of $2,500 on one or more occasions.

Fraud in excess of $2,500 is a third degree felony, contrary to Section 30-16-6 NMSA 1978 Comp., as amended.

COUNT 3

That between the first day of May, 1983, and the thirty first day of March, 1985, in Dona Ana County, State of New Mexico, the defendants Laverne Balko, Justin Yarbrough and Kelly Yarbrough intentionally conspired or agreed one with another or with others to commit the felony of fraud in excess of $2,500 on one or more fully described in Count 2 which is hereby incorporated by reference into this Count.

Criminal conspiracy to commit a third degree felony is punishable as a fourth degree felony, contrary to Section 30-28-2 (B) (3) NMSA 1978 Comp., as amended.

COUNT 4

That between the first day of May, 1983, and the thirty first day of March, 1985, in Dona Ana County, State of New Mexico, the defendant Rod Balko, at the time owner and manager of Las Cruces Auto Sales, intentionally committed the crime of racketeering while associated with an enterprise; namely, either Las Cruces Auto Sales, or Frontier Leasing and Sales in Las Cruces, New Mexico.

The defendant intentionally conducted or participated directly or indirectly in the affairs of the enterprise by intentionally engaging in two or more incidents of racketeering activity comprising a pattern of racketeering activity.

The pattern of racketeering activity referred to above consists of two or more of the felonious acts of fraud as more fully described and as charged in Counts one and two of this Criminal Information and incorporated herein by reference as incidents of racketeering. The felony of fraud is a racketeering offense in the New Mexico Racketeering Act as described in 30-42-3A(6).

This pattern of racketeering activity is contrary to Section 30-42-3A(6), NMSA 1978 Comp., as amended, a second degree felony.

The defendants have each agreed to waive any preliminary hearing or presentment to a grand jury; however, the names of the witnesses upon whose testimony this information is bases are:

1. Willie Garcia
   Special Agent
   Office of the Attorney General
2. Ed Staffel
   Director of Investigations
   Office of the Attorney General
3. Homer Jackson
   Detective
   Las Cruces Police Dept.

Respectfully submitted,

Paul Bardacke
Attorney General
Fred Chris Smith
Director of Special Prosections
P.O.Drawer 1508
Santa Fe, New Mexico
87504-1508
505-827-6088

IN THE DISTRICT COURT

COUNTY OF DONA ANA

STATE OF NEW MEXICO,

Plaintiff,

vs. No. CR-85-96

ROD BALKO,

Defendant.

PLEA AND DISPOSITION AGREEMENTS

The State of New Mexico and the defendant hereby agree to the following disposition of this case:

Plea: Defendant will plead guilty to the following charges:

A) Fraud in excess of $2,500 but less than $20,000 contrary to Section 30-16-6 NMSA 1978 Comp., a third degree felony (Count II).

B) Fraud in excess of $100.00 but less than $2,500, contrary to Section 30-16-6 NMSA 1978 Comp., a fourth degree felony (Count I).

C) Racketeering contrary to 30-42-4(C) NMSA 1978 Comp., a second degree felony (Count IV).

Terms: On the following understanding, terms and conditions:

1. That the Defendant will plead guilty to the charges contained in the information and that sentencing will be left to the discretion of the court, provided that he will not be imprisoned for more than nine (9) years.
2. That any additional charges relating to the operation of Las Cruces Auto Sales and Frontier Leasing shall not be filed against the defendant. (In exchange for full restitution, no charges will be brought in Curry County, New Mexico, for alleged bad checks).
3. That defendant cooperate with police agencies concerning motor vehicle titles and any other criminal activity of which he is aware, and testify in court concerning his knowledge of these activities if called to do so. The State will represent the nature and extent of defendant's cooperation to the Court, at time of sentencing.
4. That this agreement, unless rejected or withdrawn, serves

to amend the complaint, indictment, or information to charge the offense to which the defendant pleads, without the filing of any additional pleading. If the plea is rejected or withdrawn, the original charges are automatically reinstated and the charges not being brought against the defendant as indicated in subsection "2" above may be charged.

5. Unless this plea is rejected or withdrawn, that the defendant hereby gives up any and all motions, defenses, objections or requests which he has made or raised, or could assert hereafter, to the court's entry of judgment against him and impositon of a sentence upon him consistent with this agreement.

6. That, if after reviewing this agreement and any presentence report the court concludes that any of its provisions are unacceptable, the court will allow the withdrawal of the plea, and this agreement shall be null and void. If the plea is withdrawn, neither the plea nor any statements arising out to the plea proceedings shall be admissible as evidence against the defendant in any criminal proceedings.

I have read and understand the above. I have been advised of my constitutional rights by the court. I understand that by pleading guilty I will be giving up my right to a trial by jury, to confront, cross-examine, and compel the attendance of witnesses and my privilege against self-incrimination. I agree to enter my plea as indicated above on the terms and conditions set forth herein, I fully understate that if, as part of this agreement, I am granted probation, a suspended sentence or a deferred sentence by the court, the terms and conditions thereof are subject to modification in the event that I violate any of the terms or conditions imposed.

5-1-85 (s)

Date Defendant

I have reviewed this matter and concur that the plea and disposition set fourth herein are appropriate and are in the interests of justice.

5-1-85 (s)

Date District Judge

The Plea and Disposition Agreements of the remaining defendants are indentical to the foregoing agreement, except that Kelly Yarbrough entered a guilty plea to Counts I and III and was guarantee no more than 18 months in prison, Justin Yarbrough entered a guilty plea to Counts I, II and III and was guaranteed no more than 3 years in prison, and Laverne Balko pentered a guilty plea to Counts I and III and was guaranteed nor more than 18 months in prison.

None of the other plea agreements refer to Curry County charges

THIRD JUDICIAL DISTRICT COURT
COUNTY OF DONA ANA
STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff,

vs.

ROD BALKO, LAVERNE BALKO
JUSTIN YARBROUGH and
KELLY YARBROUGH,

Defendants.

No. CV-85-466(stet)

JUDGE BURKS

DECISION

THE COURT, having read and considered the Requested Findings of Fact and Conclusins of Law filed by the parties, and all of such Requested Findings and Conclusions not herein contained being hereby expressly refused, makes the following Decision:

FINDINGS OF FACT

1. That at the time the Defendants were arraigned before The Honorable James T. Martin, District Judge, and before they entered pleas of guilty herein, Judge Martin explained to them, and to each of them, that the Office of the Attorney General had no control over the sentences they would receive, and that their sentence would be determined by the sentencing judge, and the Defendants advised Judge Martin that no promises had been made to them.

2. That the Defendants were never advised not to truthfully answer Judge Martin's questions at their arraignment.

3. That no promises of any kind as to sentencing were made to the Defendants, or to any of them, other than contained in the written Plea and Disposition Agreement on file herein.

4. That the Defendants were free at any and all times material hereto to consult an attorney.

5. That the Defendants' pleas were knowingly, voluntarily, and freely given, and were not the result of coercion or promises, other

than such promises as were contained in said Plea and Disposition Agreement.

6. That as Defendants' Motion to Withdraw Guilty Pleas was not filed until after their sentences were pronounced and a Motion asking that said sentences be reconsidered was substantially denied.

CONCLUSIONS OF LAW

1. That the Court has jurisdiction over the subject matter hereof and the parties hereto.

2. That the guilty pleas herein entered by the Defendants are valid and enforceable.

3. Each and every count contained in the Information charges an offense and adequately advises the Defendants of the crimes with which they are charge and states all essential elements thereof, and any objections the Defendants may have in such respects were waived by their pleas of guilty to the Information and the counts therein.

4. That the Motion to Withdraw Guilty Pleas filed herein should be denied.

_____(s)_____
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that a copy hereof was mailed to counsel of record this 30th day of January, 1986.

_____(s)_____
Kathleen S. Hamilton